Brief of Counsel for Appellees

Supreme Court of the United States

OCTOBER TERM, 1897.

Filed Jan. 31, 1898.

No. 4.

THE CITY OF NEW ORLEANS,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

BRIEF FOR APPELLEES.

W. W. HOWE,
JOHN F. DILLON,
Counsel for Appellees.

C. A. Gardiner, Walker and Printer Service, N. Y.—1897.

Supreme Court of the United States.

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THE CITY OF NEW ORLEANS, Appellant, vs. THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.	No. 3.

BRIEF FOR APPELLEES.

Statement.

This was a suit in equity brought by the Texas and Pacific Railway Company, as assignee of the New Orleans Pacific Railway Company and the Fidelity Insurance Trust and Safe Deposit Company against the City of New Orleans, praying that two ordinances adopted by the City Council of New Orleans repealing and abrogating certain rights and franchises theretofore granted to the New Orleans Pacific Railway Company be declared illegal and void, and praying that the rights thus sought to be repealed be declared valid and existing rights of the Texas and Pacific Railway Company, as assignee aforesaid.

From a decree of the Circuit Court for the Eastern District of Louisiana granting the relief prayed for, the City of New Orleans brings this appeal.

In order that the Court may clearly understand the relation of the complaining company to the City of New Orleans, growing out of these franchises, we shall

state *in extenso* and chronologically the facts disclosed by the record.

The New Orleans Pacific Railway Company was incorporated by Act No. 14 of 1876 of the General Assembly of the State of Louisiana, as amended by Act No. 12 of 1878, with power among others to locate, construct, lease, own and use a railroad to be built upon such a course or road as might be deemed expedient by a majority of the directors of said company, from a point on the Mississippi River at New Orleans or between New Orleans and Iberville Parish on the right bank of the Mississippi River, to the City of Shreveport, Louisiana, or Marshall or Dallas, Texas; and for this purpose the right of way was granted across or along, or upon any waters, water courses, river, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana.

It being a great commercial advantage to the City of New Orleans to have said company locate its southern *terminus* within the city limits, the City Council on November 9th, 1880, by ordinance No. 6695, Administration Series granted the company the right to establish its terminus within the city limits; and further granted it rights of way on and through certain streets and places in tbe City of New Orleans. This ordinance is as follows:

"WHEREAS, the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana State laws, is vested with authority under an act approved February 19, 1876, as follows, to wit: 'To locate, construct, lease, own and use a railroad, with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient,' and to and between the points and places mentioned and implied in said act, and is hereby authorized 'to establish and main-

tain in the City of New Orleans proper freight and passenger depots,' and to construct wharves, piers, warehouses, yards, depots and stations; and to 'construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across and along and upon any street, highway, turnpike or canal in the State of Louisiana which the course of said railways may intersect, touch or cross. Provided the said company shall preserve any street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily'; and,

"WHEREAS, it is for the interest of the City of New Orleans that the Southern *terminus* of said railroad shall be fixed and established within the city limits; and,

"WHEREAS, the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the east bank of the Mississipi, from a crossing near Baton Rouge, to some point in the City of New Orleans, between the new canal and Melpomene street, and to establish its terminus at such point, on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street, for passenger purposes; and shall also grant the right to extend its tracks from such terminus north of Claiborne street by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt railroad on St. Joseph street, and on the levees by other railroad companies in the City of New Orleans.

"Now, therefore, for the purpose of permanently securing to the City of New Orleans the advantages that will result from locating and maintaining the *terminus* of the said New Orleans Pacific Railway *within the city limits:*

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans Pacific Railway Company be, and it is hereby, authorized and empowered to locate, construct and maintain a railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, to and from such point as shall be selected by such company

as its terminus, between the new canal, Claiborne canal and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, shops, yards, warehouses and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers within the city limits.

"SEC. 2. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street; and to operate the same by steam or otherwise for the transportation of passengers; provided, that should it become necessary for the building of depot or laying of tracks to remove the Claiborne market, then the said New Orleans Pacific Railway Company obligate themselves to rebuild the same at their own expense on such lots to be purchased by the company as the city shall designate. The said market to be rebuilt under the supervision and instructions of the administrator of waterworks and public buildings.

SEC. 3. Be it further ordained, that the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and usefnl and appurtenant to said railroad upon lines and levels to be furnished by the city surveyor, across Claiborne canal into and through such street as may hereafter be lawfully selected to the river front, with the right to extend its tracks through Front street, Water and Jackson streets, connecting with the depots of the Louisville and Nashville Railroad Company, Morgan's Louisiana and Texas Railroad, and the Chicago, St. Louis and New Orleans Railroad, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise, and other freight; or the said company may purchase, lease, control,

maintain and operate by steam or otherwise, any railway or railway tracks now existing in the streets of the City of New Orleans.

SEC. 4. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period said right of way privileges shall last and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate, and be without force and effect from the date of such abandonment and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to its terminus in this city within two years from the promulgation of this ordinance.

SEC. 5. Be it further ordained, That the rights herein granted *on Claiborne street* shall apply only to a railroad *for passenger purposes;* that the rights to be granted from north of the Claiborne canal to the river front and hereby granted along the river front and in parallel streets, shall apply to a railroad for freight purposes only, and shall not be used as a thoroughfare for the transportation of passengers without consent of this council."

Sec. 4 of this ordinance declares the condition on which the grants were made to be as follows:

1. That the grantees shall permanently establish the *terminus* of the road *within the city limits.*

2. That they shall maintain said terminus within the city limits during the existence of the charter of said company.

3. That all construction work done within the city

limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce.

4. That said grantees shall complete the road from the crossing of the Mississippi River at or near Baton Rouge to its terminus in this city within two years from the promulgation of *this* ordinance.

The ordinance just above stated having given to the company the right to select a street through which it might connect its tracks on Claiborne street in the rear of the city, with its tracks on the river front in the front of the city, on December 3d, 1880, the City Council adopted an ordinance *supplementary* to the ordinance No. 6695, Administration Series, and designated as No. 6732, Administration Series, whereby Thalia street was designated by the Council as the street through which the company should connect its tracks on Claiborne street with its tracks on the river front. This latter ordinance was as follows:

" WHEREAS, on the ninth day of November, 1880, the ordinance No. 6695 (Administration Series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the City of New Orleans; and it was contemplated by said ordinance that a street should be duly selected whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front through a street to be selected; now, therefore,

" SECTION 1. Be it ordained by the City Council of the City of New Orleans that the New Orleans Pacific Railway Company, or its assigns, be, and it and they are hereby, authorized and empowered to locate, construct and maintain an extension of its railroad, with

all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor across Claiborne canal, into and through Thalia street, to the river front, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans; provided, that there shall be but one track laid on Thalia street, from Claiborne to Water street.

"SEC. 2. Be it further ordained that the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and to maintain said terminus during the existence of the character of said company, for which period said right of way and privileges shall last; and, should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such abandonment; and upon the further condition that the said company, at the time of laying their track upon Thalia street, shall pave said street from Pilie street to Rampart street, including all intersections of said Thalia street, with blocks of the best hard Boston granite, oblong in shape, not less than eleven inches and not more than fourteen inches in width, and not less than sixteen inches nor more than twenty-four inches in length, and from nine to ten inches thickness; they shall be well quarried, having paraliel sides and ends, and the upper side free from lumps. The blocks adjoining the gutter stones shall be cut at an angle of forty-five degrees with the sides, so as to be laid diagonally, and said pavement shall extend from curb to curb; and the said company shall at the time of laying their track pave with round or cobblestone pavement, laying with gutter stones the gutters of said street, from the end of the block, paving at Rampart street to Claiborne street, with the privilege of using for the pavement the cobblestones removed from that part of the street to be paved with square block, the

rails to be laid in the pavement so that the top of the rails shall be flush with the surface of the pavements and upon the further condition that said railway company shall at all times keep said pavement from curb to curb in repair; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and administrator of commerce, and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

"SEC. 3. Be it further ordained, That upon the failure of said company to comply within three days with any notice of the department of improvements to repair any portion of the street or streets through which said company shall lay its tracks, they shall be fined twenty-five dollars for each and every day they fail to comply with said notice; said fine to be recoverable before any court of competent jurisdiction."

The conditions expressed in this supplemental ordinance are as follows:

1. That said grantees shall permanently establish the *terminus* of said road *within the city limits.*

2. That they shall maintain said terminus during the existence of the charter of said company.

3. That said company at the time of laying their track upon Thalia street shall pave said street.

4. That all construction work within the city limits shall be executed under the direction and supervision of the City Surveyor and completed to the satisfaction of the Administrator of Improvements and Administrator of Commerce.

These two ordinances, Nos. 6695 and 6732, Administration Series, contain the further stipulation or condition that should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus with the city limits,

then this grant shall cease and terminate, and be without force or effect from the date of such abandonment.

In the early part of the year 1881, however, the New Orleans Pacific Railway Company, exercising the alternative privilege conferred upon it by its charter of running down either the left bank of the river from a point opposite or near Baton Rouge, to New Orleans, or crossing at Baton Rouge and running down the east bank to New Orleans, decided to run down the west bank to New Orleans, and accordingly purchased the railroad already constructed by the New Orleans, Mobile and Texas Railroad Company on the west bank of the Mississipi River, extending from Bayou Goula (a point near Baton Rouge on on the west bank) to Westwego, just opposite New Orleans, and also on the west bank of the river at or near which point it purposed crossing the river.

On March 29th, 1881, subsequent to this change of route, the City Council, recognizing and acquiescing in this change (as will appear from the preamble), adopted Ordinance No. 6938, Administration Series, as *amendatory of and supplementary to* Ordinances Nos. 6695 and 6732, Administration Series, as follows:

"WHEREAS, the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile and Texas Railroad Company, on the west bank of the Mississippi River, between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in Section 1 of Ordinance No. 6695, Administration Series, passed on the ninth day of November, 1880; such line to cross the Mississippi River from a point at or near Westwego to a point on the east bank of the river in front of the Upper City park, late Fou-

cher property; thence to extend by the best and most practicable route to designated terminus, between the new canal, Claiborne canal and Carrollton avenue:

"NOW, THEREFORE, for the purpose of securing to the City of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the City of New Orleans, as hereinabove recited:

"SECTION 1. Be it ordained by the council of the City of New Orleans, that the New Orleans Pacific Railway Company, or its assigns, be, and are hereby, authorized and empowered to locate and maintain a railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient, useful and appurtenant to said railroad, from such point on the river front as its crossings from Westwego shall be located at in the vicinity of the Upper City park, along the western border of the said city park, and from thence by the best and most practicable route to its designated terminus east of Carrollton avenue.

"SECTION 2. Be it further ordained, etc., that the City of New Orleans agrees to lease unto the New Orleans Pacific Railway company, its successors and assigns, for the period of ninety-nine years, and at the price of five hundred dollars per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said grounds such *ferry facilities*, wharves, piers, warehouses, yards, *tracks*, *depots*, *stations*, *sheds*, elevators and other structures, as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, *and in the transaction of its business.* No vessel shall occupy or lie at such wharves without the consent of said company, its successors or assigns, and all vessels lying at or using said wharves with such consent, shall be exempt from the payment of levee or wharf dues to the City of New Orleans; *the proceeds of such lease shall be applied by the city to the improvement of said park.*

SEC. 3. Be it further ordained, etc., that the said

New Orleans Pacific Railway Company, its successors and assigns, shall have the right to extend *its* tracks from the said ground so leased between the Upper City park and the river front, easterly along said river front to connect with the belt road at Louisiana avenue, *and* to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by Section 3 of Ordinance 6695, Administration Series, adopted November 9th, 1880, and by ordinance No. 6732, same series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street *the trains of said company* shall be run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of the company.

SEC. 4. Be it further ordained, etc., that the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred for the term of its charter and from and after the expiration of the existing lease of city wharves, to enclose and occupy for its purposes and uses, that portion of the levee, batture and wharf in the City of New Orleans in front of the riparian property, acquired or to be acquired, between Thalia and Terpsichore streets, and to erect and maintain thereon at its own expense such *ferry facilities, wharves, piers,* warehouses, elevators, yards, tracks, depots, *stations,* sheds and other structures as shall be necessary and convenient for the *transfer of cars, engines, passengers and freight, and in the transaction of its business.* No vessel shall occupy or lie at such wharves without the consent of said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such consent and on the business of the company shall be exempt from the payment of levee or wharf dues to the City of New Orleans.

Said wharves and other structures shall be lighted and policed by said company at its own expense.

Any vessel lying at these wharves with the consent of the company, but not on its business, or not for the purpose of discharging or receiving freight or passengers to or from said company as a carrier, shall be liable to the city for usual wharf or levee dues.

Any vessel using said wharf to receive any freight not coming to or going from said company as a carrier shall pay usual wharfage dues to the city.

In consideration of the permission herein given, the company will build three hundred feet *of new wharf* at such point between Terpsichore and Jackson streets, *for the city*, as the administration of commerce may indicate, and will pave Pilie street between Thalia and Terpsichore streets, and Terpsichore street between Pilie and front with square blocks of granite or with blocks of compressed asphalt, and keep the same in good order.

The rights conferred by this section shall not be held to interfere with the rights of the city to police any part of the river front.

SEC. 5. Be it further ordained, etc., that the Mayor be, and he is hereby, authorized and directed to enter into a proper notarial contract of lease for the purpose of carrying out the provisions of the second section of this ordinance.

SEC. 6. Be it further ordained, etc., that the right of way, franchises and privileges *herein* and *heretofore* granted to the New Orleans Pacific Railway Company *are and were* granted on condition and in consideration that the said grantee shall permanently establish *its terminus* within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company, at any time hereafter, *remove its terminus* from within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of public improvements and the administrator of commerce; and the further condition that said railway company shall construct or control a line of road, ready for public use, from *a crossing* of the Mississippi River *to its designated terminus in this city*, within two years from the promulgation of this ordinance."

By Section 6 of this *amendatory* and *supplemental* ordinance, it is declared that the conditions upon which the rights *herein* and *heretofore* were granted, *are* and *were* as follows:

1. That said grantees shall permanently establish *its terminus within the city limits.*

2. That they shall maintain said terminus during the existence of the charter of said company.

3. That the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce.

4. That said grantees shall construct *or control* a line of road *ready for public use* from *a crossing* of the Mississippi River to its designated terminus in the City of New Orleans, within two years from the promulgation of *this* dinance.

It will be noted that in the preamble the city recognized and approved :

1. The change of route from the east bank from or near Baton Rouge to the west bank, and did not impose the condition contained in former ordinances that the company should maintain its road on the east bank between Baton Rouge and New Orleans.

2. The change of crossing of the Mississippi River from "a point at or near Baton Rouge" to "a crossing of the Mississippi River."

It will further be noted that the City by Sections 2 and 4 of this ordinance granted to the Company the same and equal *terminal* privileges on the upper Park batture and on its Thalia Street property in the front of the City, as it did by Section 1 of Ordinance 6695 A. S. in the space between the New Canal, Clarborne Canal and Carrollton Avenue in the rear of the city, thus giving the Company the *option* of designating and establishing a terminus or termini at one or all of these places.

Subsequently, but prior to July, 1882, the company established a crossing of the Mississippi River opposite Thalia street, a short distance below Westwego, called Gouldsboro, and permanently established a terminus at Thalia street and the levee on the east bank of the river within the city limits, where it laid a quantity of tracks and erected, under the above-mentioned grants, large freight and passenger depots, yards, ferry facilities, etc., and connected same with the crossing. This was done under Section 4 of the last-named ordinance on the riparian property of the railway company, fronting eight hundred feet on the Mississippi River between Thalia and Henderson streets, at a cost for land and buildings of six hundred and twelve thousand dollars.

Thereafter, on July 11th, 1882, the city council adopted ordinance No. 7946, Administration Series, as *supplementary* to said ordinances Nos. 6695, 6732 and 6938, Administration Series, for the purpose especially of carrying into effect Section 2 of Ordinance No. 6695, Administration Series, relating to the manner of removal of the Claiborne Street Market House, in order that the company might occupy said street to reach a passenger depot which it had also been given the right by said Ordinance No. 6695 to establish at the crossing of Claiborne and Canal streets. This ordinance is as follows:

MAYORALTY OF NEW ORLEANS,
CITY HALL, July 11th, 1882.

(No. 7946, A. S.)

An ordinance *supplementary to ordinances 6695, 6732 and 6938*, administration series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market.

WHEREAS, by section 2, of ordinance 6695, administration series, a right was given to the New Orleans Pacific Railway Company, or its assigns, to locate, construct and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a proviso that should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same at their own expense on such lots as the city shall designate; and

WHEREAS, by ordinances Nos. 6732 and 6938, administration series, certain rights have also been granted to said company and its assigns with reference to the said Claiborne street and to Thalia street, *and the company has built its road from Baton Rouge to New Orleans, crossing Thalia street, and established its terminus in the city limits at Thalia street and the levee,* and is preparing also to cross from Westwego to the City park, and thence to Claiborne street; now, therefore,

Section 1. Be it ordained by the council of the City of New Orleans, that the Administrator of Improvements, the Administrator of Commerce, and the Administrator of Water Works and Public Buildings, be, and they are hereby, authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a process verbal thereof in the office of the Administrator of Water Works and Public Buildings.

Sec. 2. Be it further ordained, that whenever said company or its assigns shall find it necessary to remove said building it shall be rebuilt on said lots so selected and as prescribed in said original ordinance.

Sec. 3. Be it further ordained, that in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper drawbridge.

Adopted by the Council of the City of New Orleans, July 11th, 1882.

JOS. A. SHAKSPEARE,
Mayor.

(A true copy.)
GEO. W. FLYNN,
Secretary.

In the preamble to this ordinance it will be noted that the fact is recited that the company *had built its road from Baton Rouge to New Orleans; had made a crossing of the Mississippi River at Thalia street; had established its terminus in the city limits at Thalia street and the levee;* and was preparing to cross also from Westwego to the City Park, and thence to Claiborne street.

These recitals have never been disputed or denied, and could not be, and, according to the uncontradicted testimony of E. B. Wheelock and Robert Strong, were true in every particular.

The road of the company was completed from Shreveport and Baton Rouge to New Orleans, prior to July, 1882, and was ready and open for public use prior to that date (p. 65).

By articles of consolidation and merger, filed and recorded in the office of the Secretary of State, The Texas and Pacific Railway Company, on June 20th, 1881, became the owner of all the franchises and grants made to the New Orleans Pacific Railway Company by the above-enumerated ordinances, and took possession in September, 1882. This is not disputed.

After the passage of the ordinance No. 7246, of July 11th, 1882, the officers of the company made demand on the city officers named by said ordinance, for that purpose, to designate the lots to which the company should remove the Claiborne market preparatory to laying their track and building a passenger station on Claiborne street; but though demands were made, the city officers neglected or refused to designate said lots, notwithstanding the company expressed itself as anxious and willing to at once comply with its obligations relating thereto; and not until this day have such lots been designated by the city as required under the

terms of these ordinances. The right on Claiborne street was for passenger purposes only, and could not be availed of so long as there was no place for a passenger depot at the provided point.

The City Charter of 1870 and the government by the administrators was repealed in June, 1882, and the new Charter of 1882 went into effect in November of that year (Acts of 1882, pp. 14–37). In the meantime a controversy arose between the City Surveyor, Mr. Brosnan, under whose direction the work had thus far been done, so far as his direction was required, and Mr. Wheelock, the agent of The Texas and Pacific Railway Company, and the president of the New Orleans Pacific Railway Company, as to further lines to be given between Louisiana avenue and Jackson street on the river front. The company was plainly entitled to lines on the river front from Louisiana avenue to Jackson street, and it would hardly be expected that it could proceed with the plan of the ordinances when such a gap was left, extending for about a mile and a half. The company claimed the lines under Section third of the ordinance No. 6938, by which it is apparent *its tracks* were to extend along the river front from Louisiana avenue to Jackson street, with certain provisos as to their use. This controversy continued for a time, and finally resulted in the New Orleans Pacific Railway Company bringing an action of mandamus in 1883, which was defended and which is still pending (p. 85).

Soon after, in 1884, the City Council, which seemed to be hostile under this new regime, passed one of the repealing ordinances involved in this case, being the ordinance No. 685 C. S., of April 24th, 1884, as follows :

MAYORALTY OF NEW ORLEANS,
CITY HALL, April 24th, 1884.

(No. 685, council series.)

An ordinance repealing certain sections of the ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.

Be it ordained, That section two (2) of the ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be, and the same hereby is, repealed and revoked.

Adopted by the council of the city of New Orleans, April 15th, 1884.

M. MCNAMARA,
Clerk of Council.

Approved April 24th, 1884.
W. H. BEHAN,
Mayor.

In June, 1886, the City Council passed the other repealing ordinance, No. 1828, of which appellees complained in this clause, as follows:

MAYORALTY OF NEW ORLEANS,
CITY HALL, June 16th, 1886.

(No. 1828, council series.)

An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under ordinance No. 6695, A. S., adopted November 9th, 1880; No. 6732, A. S., adopted December 3rd, 1880; No. 6938, adopted March 29th, 1881; No. 7946, adopted July 11th, 1882; and

WHEREAS, the city of New Orleans granted to the Pacific Railway Company the right to extend its track through Claiborne street to Canal; to erect a passenger depot on Claiborne street, near Canal street; construct tracks from Claiborne street to and through Thalia street to the river; and

WHEREAS, the original grantee company has merged its identity with that of an *alien* corporation, which it-

self is now in the hands of a receiver appointed on the prayer of an *alien* corporation; and

WHEREAS, such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

WHEREAS, by the acts of said New Orleans Pacific Railway Company such rights have been abandoned, and it is necessary for the public good that Claiborne street between Common street and the old basin shall be used for steam and horse railway and depot purposes;

Therefore, be it ordained by the council of the city of New Orleans that all rights of way *on Claiborne street, and rights to establish a passenger depot on said street*, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street or to erect any depot thereon, whether acquired through or by the ordinances above enumerated, or through or by any other ordinance of the council of the city of New Orleans be, and the same are hereby, repealed and revoked.

Adopted by the council of the city of New Orleans, June 8th, 1886.

W. H. MICHEL,
Assistant Clerk of Council.

Approved June 16th, 1886.
D. M. KILPATRICK,
Mayor *pro Tem.*

Thereupon the complainants The Texas and Pacific Railway Company and the Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, to which latter company all these rights were mortgaged to secure an issue of over five million dollars of bonds, filed a bill in this case to declare the two repealing ordinances to be illegal, and to remove the cloud caused by their presence. The transcript shows also at pages 68–70 that, by a suit in the Civil District Court for the Parish of Orleans, in which a supplemental petition was filed as late as December 14th, 1888, the City of New Orleans was asking a large money judgment

against the New Orleans Pacific Railway Company for certain paving on Terpsichore and Pilie streets, the company's Thalia street terminus; and in this suit, which is still pending, with sundry and sufficient defenses, the city admitted and asserted the existence of the rights granted by the three ordinances Nos. 6695, 6732 and 6938, Administration Series, and admitted that the company *had availed itself of those rights* so far as to establish its terminus, crossing, &c., at Thalia street, as also shown by the ordinance No. 7946, Administration Series, already quoted.

There is no dispute that the terminus of the New Orleans Pacific Railway Company was established at Thalia street and the river, on the east side of the Mississippi, and within the city limits, prior to July 11th, 1882, and that its road at that time was established and ready for public use from the tracks at that terminus on the east side of the Mississippi River to the crossing of the river at Thalia street between Thalia and Terpsichore streets, and thence across to the west bank and to Baton Rouge and Shreveport prior to July, 1882. Mr. Wheelock, page twenty-five *et seq.*, gives some of the particulars in regard to this matter, and to save a mass of unnecessary details the testimony of Mr. Wheelock and of Mr. Robert Strong was taken by consent in a succinct manner, and is found at pages 64 and 65. They both state as follows:

"The recitals of the ordinance of the City of New Orleans, No. 7946, A. S., July 11, 1882, are correct as a matter of fact. The terminus therein referred to as having been established in the city limits was established *prior to July, 1882*, by the New Orleans Pacific Railway Company, as stated, and conveyed to the Texas and Pacific Railway Company by consolidation. The Texas and Pacific Railway Company went into actual possession about September, 1882, and has

maintained this terminus, which is a permanent one, in the city at that point ever since. The terminals there are very large and valuable, and are assessed for taxation at $612,000.

"The New Orleans Pacific Railway Company constructed and controlled a line of road ready for public use *from a crossing of the Mississippi River to its said designated terminus* in this city within two years from November 4, 1880, and March 29, 1881, *and prior to July, 1882.*

"The road has been opened to public use and operated ever since by the New Orleans Pacific Railway Company and its assigns and transferee The Texas and Pacific Railway Company. It may be briefly described as extending at that time and now from the Thalia street terminus in New Orleans, where it has a large number of tracks, thence to the crossing of the Mississippi River from Thalia and Terpsichore streets; thence to Gouldsboro, on the right bank of the river, by transfer boats on which the cars are crossed; thence to Baton Rouge Junction and Baton Rouge, and from Baton Rouge Junction on to Shreveport and El Paso, Texas.

"The railroad so constructed and completed in 1881 and July, 1882, has been operated ever since. Though it was out of repair somewhat when Mr. Pitkin's report was made in the receivership suit No. 11,181, it was repaired by the Receivers and restored by the Court to the complainant company in October, 1888.

"It was always maintained as a railroad, and though it was out of repair at the time of Mr. Pitkin's report, *was always operated*, and was put in repair and restored to the company when the receivership terminated in 1888.

"As a matter of fact the strip or parcel of ground leased by Section 2 of the Ordinance No. 6938, A. S., is accretion or batture outside of the River road, or Tchoupitoulas street, in front of the Upper City Park, now called Audubon Park. The public levee extends along the outer edge of this Tchoupitoulas street, or the River road, and the said strip or parcel is outside of the public levee. It is covered by water at high water, and can only be utilized by being filled up."

There is no dispute that in the establishment of this terminus and its connected crossing at ~~Tchoupitoulas~~ Thalia

street the railway company built a new wharf under section four of the ordinance No. 6938, A. S., under the direction of the city surveyor, and to the satisfaction of the administrators mentioned in the ordinance, and paid for it upon such acceptance the sum of $5,000.

Nor is it disputed that under the lease established by section 2 of the same ordinance, of the batture in front of the upper city park, outside the public levee, the railway company paid the City of New Orleans two annual installments of rent, amounting to $1,000, which was to be devoted to the improvement of the park itself, lying behind Tchoupitoulas street, and that the city has never returned or offered to return that money (p. 27).

Some nine months after the suit was begun, and after argument, the Hon. D. A. PARDEE, Circuit Judge granted an injunction *pendente lite* as prayed for in the bill and supplemental bill, and, after further hearing on the merits and careful advisement, the District Judge, sitting in the Circuit Court, rendered the final decree in favor of the railroad company and the trust company (p. 86), declaring the two repealing ordinances in question to be illegal and injurious, and enjoining their execution and recognizing the rights of the company as claimed under the ordinance as existing and valid grants; decreeing, however, with reference to the lease of the park batture, that the declaration as to its existence and validity should be without prejudice to any rights which the City of New Orleans, as successor to the late Park Commission, or as having the administration of the Audubon Park vested in by law, may have in limitation or control of the rights, the grant of which was confirmed, springing out of the designation of the said

Audubon Park as a public place (pp. 86, 87). The City of New Orleans took its appeal (p. 88), but made no assignment or specification of error.

ARGUMENT.

FIRST POINT.

Under the law of Louisiana the City of New Orleans could not lawfully repeal the ordinances conferring rights on the Railway Company.

It may be a convenience to the Court to discuss firstly a point on which alone the decree should be affirmed as to both repealing ordinances, and certainly No. 1828, A. S., which undertakes to rescind our rights to a passenger track and a passenger depot on Claiborne street.

It should be premised that we by no means concede that the railway company has failed to perform the conditions of the grants. On the contrary, we maintain with confidence that they have been performed. But if it should be seen that a consideration of our first point will dispense the Court from further examination of the case, it would seem but proper to adopt such an order of argument.

All the conditions upon which the grants sought to be repealed were made are what are known in the civil law and in the law of Louisiana as resolutory conditions, which resemble the conditions subsequent of the common law, when such conditions operate to

defeat an existing grant. There can be no doubt that this case is governed by the law of Louisiana, the situs of the city and the property, and that the exposition of that law by the highest Court of the State will be followed by this tribunal.

Article 2045 (2040) of our Revised Civil Code of 1870 provides as follows:

"ART. 2045 (2040). The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the matter had not existed.

"It does not suspend the execution of the obligation; it only obliges the creditor to *restore what he has received*, in case the event provided for in the condition takes place."

And Article 2047 (2042) provides as follows:

"ART. 2047 (2042). In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event not depending on the will of either party, the contract is dissolved by right; but in other cases *it must be sued for*, and the party in default may, according to circumstances, *have a further time allowed for the performance of the condition.*"

In the case of Gayden vs. Louisville and Nashville Railroad Company *et als.*, 39th Ann., 269, the plaintiff by a deed dated August 19th, 1882, had granted a right of way to the railway company, 100 feet wide, on a line to be adopted by the company with the express agreement that should the railroad not be built within eighteen months of the date of the agreement, the contract should be null and void. The suit, as the Court states, was brought on the assumption that the condition of building within eighteen months not having been complied with the contract was null and void. The railroad was not completed within the

eighteen months, and not until nearly two years after the date of the grant. The Court held that the provision that the contract should be null and void if the railroad should not be built within eighteen months from the date of the agreement, was plainly a resolutory condition, and that the plaintiff might have a standing but for this contract of August 19th, 1882, and that hence the question was whether that contract had or had not been dissolved. The Court conceded that the contract provided that should the railroad not be built within eighteen months from its date, then the contract should be null and void; and conceded that the road had not been built within that time. But the Court held that it did not follow on that account that the contract was *ipso facto* dissolved. The Court cited the Article 2047, referred to above, declaring that the delay beyond the term of eighteen months was an act dependent on the will of the parties and that the dissolution of the contract must be judicially sought, and gives the equitable reason why such a provision has been made by the legislator, saying among other things that the grantor might have prevented the performance himself. In other words, it was distinctly held that the agreement that the contract should be null and void if the railroad should not be built within 18 months from the date of the agreement was resolutory in its character, and that if the railroad company did not build within the 18 months, the grantor must apply to the Court for a dissolution of the contract, and then the Court will determine whether it should be dissolved, and if the dissolution should be decreed, the Court might give time to the railroad company to fulfill the resolutory condition.

Among other things the Court said the building of

that road within that time was a resolutory condition, which by non-compliance might have the effect of dissolving the contract, as the event was dependent on the will of the defendant; *but the dissolution could not take place and be enforced unless judicially demanded and declared.*

In the case of the Southern Chemical and Fertilizing Company, Limited, vs. B. J. Wolf & Sons, 48th Louisiana An., 631–641, the Supreme Court of Louisiana was considering the grant made by the City of New Orleans to a garbage company, under a city ordinance, and recognized the doctrine for which we now contend. At page 641 the Court said:

"Plaintiffs' occupation and business rest, as we have said, upon a conventional contract, which fixes its continuance for twenty years. They have *vested rights* in this matter of which they cannot be divested by either the whim, the caprice or the dissatisfaction of the council. *A rescission of their contract could only be brought about through proceedings in which would be subjected to judicial scrutiny and determination, by judicial tests, the respective rights and obligations of the parties.*"

In the case of the City of New Orleans vs. The Wardens, &c., 11th Louisiana An., pages 244, 245, the City undertook to repeal an ordinance granting permission to the Church of St. Louis to establish a cemetery on certain land purchased near the Bayou St. John. The Wardens of the Church thought the grant amounted to a contract, and that they had a vested right of which the City could not deprive them without their consent. The counsel for the City claimed that the City might repeal the ordinance and leave the defendants to their action for damages. The Court held that the doctrine that the City of New Orleans had a right to violate a contract, and redress was to be had

only in damages against the City, was as unsound as it was novel.

In such an action it would, of course, be necessary for the party suing for the purpose of rescission, to return or tender back what it had received by reason of the contract, and to put the defendant in default by a proper demand.

McDonald vs. Vaughan, 14 Annual, at p. 717.

Latham vs. Hickey, 21 Annual, 425, 426.

The City of New Orleans has done none of these things, and as to the lease of the batture in front of the Upper City Park, it is conceded that the railway company paid two annual installments of rent and tendered another, and that the two installments, amounting to $1,000, received by the city, have been retained by it and never returned or tendered back.

Considering now the two repealing ordinances from the point of view of the well-settled and interpreted law of Louisiana, we find those repealing ordinances to be very peculiarly illegal in their character.

They do not indicate any demand having been made upon the railway company for a compliance with any duty in reference to the rights sought to be repealed, nor any putting in default, nor any required action in and by a Court. The ordinance No. 685, C. S., gives no reasons whatever for its extraordinary action. The ordinance No. 1828, C. S. (Transcript, p. 7), finds no fault with our terminus as established on the river between Thalia street and Terpsichore street, and there is utterly no reason why such fault could be found. It refers to the ordinance No. 7946, A. S., of July 11th, 1882, and does not pretend to deny any of its recitals.

It does not deny that the company had built its road from Baton Rouge to New Orleans, crossing at Thalia street, and had established its terminus in the city limits at Thalia street and the levee. It could not deny that this terminus and tracks were on the east side of the Mississippi River in the city limits, and connected with the crossing of the Mississippi River from Thalia street and Gouldsboro', and that the line of the railroad had been completed in this way from the terminus in the city limits on the east side of the Mississippi River, thence to Gouldsboro', Bayou Goula and Baton Rouge by the crossing from Baton Rouge Junction and Shreveport, far within any time limit. The ordinance exhibits on its face the marks of haste, of passion and of prepossession. It undertakes to rescind the rights in Claiborne street only, of passage and of the erection thereon of a passenger depot. It gives the extraordinary reasons that the New Orleans Pacific Railway Company had merged itself with an alien corporation, well knowing that alien corporation to be the Texas and Pacific Railway Company established by the National Congress.

It further set up the pretext that that alien corporation was at that moment in the hands of a Receiver appointed on the prayer of an alien corporation; that complaining corporation being the Missouri Pacific Rail-Company, created by our sister State of Missouri. It further alleged that the rights on Claiborne street had been abandoned, though it did not pretend that we had abandoned our terminus within the city limits, or its connections or crossings.

It then proceeded to recite that the public good required that Claiborne street between Common street and the Old Basin should be used for

steam and horse-railway depot purposes; thus admitting the propriety of the grant to us of the netural ground in Claiborne street for a passenger depot, and at the same time concealing the fact that the city herself was in default under the Ordinance No. 7946, A. S., for not designating lots for us to buy and to which the Claiborne market could be removed. Such proceedings certainly indicate haste and passion.

The animus may, perhaps, be found in the fact that the Charter of 1870, under which our ordinances had been adopted, had been repealed in 1882, and the new Charter of 1882 had gone into effect in November, 1882. The administrators, who had formed this plan of improvement were swept out of official existence, and a new council had come in, whose doings in general we may, in all charity, leave without further comment.

The best excuse we could make for these repealing ordinances is that they were passed without any consideration or knowledge of the law of Lousiania upon the subject. This law was ignored in the passage of these repealing ordinances. The City of New Orleans has never put the company in default; has never made any return or tender of return to place things as they were before the grant; and has never brought any suit to dissolve the contracts evidenced by the grants she has thus sought to repeal. If she had the right to take some such affirmative action, which we deny, she has never done so.

If she had the right to take any action in this cause, she has not done so. It is elementary that, if the defendant in equity desires affirmative relief, a cross-bill must be filed. There is no cross-bill in this case. It is, therefore, scientifically certain that the repealing

Ordinance No. 1828 is illegal, and a cloud that ought to be removed in equity, and was properly so declared by the decrees below. The repealing Ordinance No. 685, concerning the batture in front of the park, is, we submit, equally illegal for the same reason, unless, indeed, the grant in that matter was one of those absolute nullities, *ab initio*, which could not have been lawfully enacted at all.

It will not be denied that, in view of the law of Louisiania and her jurisprudence, it is the custom in contracts, when it is intended that they should be dissolved, *ipso facto*, by breach of resolutory conditions—that is, conditions subsequent going to defeat a grant—to insert some such clause as this: "In case such condition be not complied with, then this contract shall be dissolved, *ipso facto*, without any return or tender, or any putting in default or any suit or application to a court." Nor will it be denied that similar clauses are put in city contracts, and that in their absence the city brings suits to annul and rescind. Such suits are pending now as to other grants to other corporations.

SECOND POINT.

The lease of the use of the batture in front of the Upper City Park was a valid act, and was not ultra vires the City Council of New Orleans.

The city contends that the lease of the use of the batture in front of the Upper City (now Audubon) Park to the New Orleans Pacific Railway Company

under Section 3 of Ordinance 6938, A. S., was void *ab initio*, being *ultra vires* the City Council, and that the Council had the right, therefore, to repeal same at any time, without resorting to the Courts to annul it. That Ordinance 685, C. S., was, for this reason, a valid enactment.

The position of the appellees is that the City Council, acting under the powers conferred by legislative charter, as well as under the sanction of general law, could validly, in behalf of the municipal corporation as such, make a *lease* of the *batture* in front of said property and outside of the levee, regardless of its relation to the ownership or administration of the park property proper.

The lease made by Section 3 of said Ordinance No. 6938, A. S., was of the *batture* in front of the park, and was for a term of 99 years at an annual rental of $500, which sum was to be applied by the city to the improvement of the park.

Under the terms of the lease the company was given the right to construct wharves, landings, etc., on the batture for the use of its business. The city actually received, and has since retained, the sum of $1,000 for two years' rent of the batture, and subsequent installments were duly tendered, but refused.

There has never been any dispute as to the character of the property affected by this lease. It is described in the testimony of Wheelock and Strong (Tr., pp.) as accretion or batture, lying outside of the river road (Tchoupitoulas street) in front of the Upper City (now Audubon) Park, and outside of the levee, which extends along the outer edge of this Tchoupitoulas street. It is covered by water during high water, and is properly called accretion or batture, being the grad-

ual deposit made by the river in front of the park property and outside of the levee.

Bouvier's Law Dict., *verbo* Batture.
Hollingsworth vs. Chaffee, 33 Ann., 548.

Being outside of the levee, it forms a part of the river bank, since, by the law of Louisiana (Rev. Civ. Code, Art. 457), on the Mississippi River and other navigable streams where there are levees established according to law, the levees form the banks of the river. This fact is important to bear in mind, as it has direct bearing on this question. For, by the law of Louisiana (R. C. C., Art. 456), while an imperfect ownership of the river banks is in the riparian proprietor, still the *use* of the river bank is *public*, and any person is at liberty (except in incorporated cities) to freely land his boats and unload goods thereon. We say except in incorporated cities, for, by the charters of most cities, and especially by the Charter of the City of New Orleans then in force (Act of 1870), the use, administration and control of the river banks within the city limits are vested in the municipality, and it may, consequently, by virtue of such statute, as well as by the general law (R. C. C., 863) construct on the river banks such facilities for commerce as it may deem necessary, and regulate and control the use thereof.

This right of *use* and administration is entirely irrespective of ownership, and every riparian proprietor within the city limits holds his title to batture subject to the exclusive use and administration by the city, which has not only the power of using it for public purposes, but even may prohibit the riparian proprietor from using it for his own purposes, and may compel the demolition and removal of works put there by him.

In the leading case of Municipality No. 2 against

Orleans Cotton Press, 18th Louisiana, 122, the subject was examined and decided at great length. In the leading opinion, at page 228, the Court said:

"The arguments of the counsel drawn from the supposed inconvenience of having a part or any part of its bank owned by individuals, and the danger of the public being excluded from the use of it to the great detriment of commerce, would be entitled to serious consideration, if it were not true at the same time that the public, through the agency of the corporation, has the sole use of the levee and of the bank of the river. That the front proprietors cannot extend the levee without the consent of the corporation, and that the city authorities have a right to make all improvements for rendering the whole most useful to the public and favorable to commerce. So far as it concerns the public convenience it seems to be of little importance whether the future increase of the batture shall be decided to belong to the public or to the front proprietors so long as the municipal authorities alone have the entire control of everything on the outside of the levee and have a right to establish wharves and other conveniences which commerce may require. In most of the seaports of the Union it is believed the wharves are private property. Here they will be public, whoever may be considered the owner of the bank of the river, subject to the public use. The Louisiana Code is explicit on this point:

"'The use of the banks of navigable rivers or streams is public, &c., nevertheless the property of the river bank belongs to those who possess the adjacent lands. On the borders of the Mississippi where there are levees, the levees shall form the banks.'"

In Ruch vs. The City of New Orleans, 43 An., 275, the Court went even further and held that where it was necessary by the wearing away of the bank to use some of the front proprietors, land for public purposes, it might be done and without compensation, saying at page 280:

"The right of appropriation proceeds upon the principles decided in Remy vs. 2d Municipality, 11th Annual, 161, that the riparian owner enjoys his property *sub modo, i. e.*, subject to the right of the public to reserve space enough for levees, public roads and the like. Over this space the front proprietor never

acquires complete domination. It never passes free of this reservation by deed to the purchaser" (Pecot vs. Police Jury, 41st An., 706; Heirs of Leonard vs. Baton Rouge, 39th An., 275; Morgan vs. Livingston, 6th Martin, 231; Municipality vs. Cotton Press, 18th Louisiana, 239).

"From the many authorities cited in this decision it is plain that the law of Louisiana is correctly cited above."

In Eldridge vs. Trezevant, 160th U. S., pages 452, 455, the Supreme Court of the United States cited the case of Ruch vs. New Orleans from the 43d An., to the effect that the riparian owner enjoys his property *sub modo; i. e.*, subject to the right of the public to reserve space enough for levees, public roads and the like; that over this space the front proprietor never acquires complete domination; it never passes free of this reservation to a purchaser.

So in the case of Watson vs. Turnbull, 34th Ann., 856, which was a suit by a riparian owner to enjoin Turnbull and the City of New Orleans from placing "hitching posts" or clusters of piles along the river bank in front of his property, with a view of making a coal boat landing at that point, the Court, at page 857, said:

"Within the corporate limits, the City of New Orleans, under her charter and under the general law, has the right to control, manage and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect works and provide facilities for the use of vessels and water craft; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the *use* thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a

proper subject for judicial control or interference. Whatever incidental damage may result to proprietors from the exercise of these unquestionable corporate rights, it is *damnum absque injuria.*

These principles are elementary and established by numerous authorities 1 M., 187; 4 M., 10; 3 L., 563; 18 L., 278; 6 R., 349; 2 An., 538; 5 An., 34; 15 An., 657; 26 An., 357; 27 An., 17; 10 An., 171 and 523; 30 An., 190."

This line of authorities was again approved in the case of Pickles vs. Dry Dock Company, 38 An., 412, in which the plaintiff, who, under contract with the City of New Orleans, was operating a ferry across the river between New Orleans and Algiers, and who had been allotted a certain space on the river bank for his ferry landing, approaches, etc., brought suit against the defendant company, the riparian owner of the space so assigned, to compel the removal of certain structures that encroached on the space allotted to him. The defendant resisted the demand on the ground that, as it was the riparian owner of the property, it had a right to maintain its structures at that place. The Court, citing with approval the doctrine stated in Watson vs. Turnbull, *supra*, maintained the action and ordered the structures removed.

We take it, therefore, as settled beyond dispute, that the City of New Orleans, under its charter and under the general law, has the sole right to control and administer the use of the river banks within its corporate limits, and may erect thereon such buildings and other works as may be necessary for public utility and commerce. And that, in determining what are proper and needed facilities for commerce, the discretion of the city authorities is manifestly not a subject for judicial control.

It follows as a corrollary that the city may, in the

administration of this use, assign particular parts of the river front for the reception of particular kinds of commodities, or for the use of certain kinds of vessels, or to certain lines of vessels or railroads.

FENNER, Justice, in Leonard vs. Baton Rouge, 39 An., at

It may make such an assignment gratuitously or for a consideration.

Thus in the case of Pickles vs. Dry Dock Co., *supra*, the assignment was in accordance with a lease which the city had made to Pickles of a ferry privilege.

The public character of such use is not destroyed by the fact that it is farmed out to a particular individual if the use to which he puts it be public in character.

Heirs of Leonard vs. Baton Rouge, 39 Ann., 275, at 285.

So in the case of New Orleans vs. Louisiana Construction Company, 140th U. S., 654-664, it appeared that the city of New Orleans, through its counsel, had made a lease of a portion of the levee known as the Sugar Landing to a private person and his assigns for twenty-five years. Your Honors held that the lease showed that the lessee was to exercise a *quasi* public employment in the erection and maintenance of sugar sheds, and remarked:

"The city has not undertaken to alienate or sell the ground under the sheds, but has only leased it for a term of years, reverting at the end of that term, with the sheds built thereon, to the city for the benefit of the public. The ground has no more ceased to be devoted to the public use by the making of the lease and the erection of the sheds than if the city had itself built and managed the sheds for the promotion of commerce and the benefit of the city and its inhabitants.

* * * * * *

" Taking all of the provisions of the lease together, we are of the opinion that it in no way affected the character of the space in question as *locus publicus*."

It seems to be definitely settled, therefore, that, in pursuance of its right of control and administration of the use of the river bank within the city limits, it was perfectly competent for the city to assign gratuitously to the New Orleans Pacific Railway, or to lease to it, the use of the particular part of the river bank designated as the batture, in front of the park, for the purposes of its business; provided such use be public in character, and provided that there be no exception to the general law depriving the city of the administration of the use of this particular part of the river bank.

In Louisiana, at least, there can be no doubt but that the use specified in the ordinance was public in character. By the Constitution of Louisiana, Art. 244: " Railways heretofore constructed or that may hereafter be constructed are hereby declared public highways."

In the case of City vs. Railway Company, 27 An., 414, the Court said in relation to a grant of a similar nature:

" Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes—to wit, to facilitate the transaction of its business with the public."

See, also,

New Orleans Pacific Ry. Co. vs. Nicholls, 30 An., 987.
Olcott vs. Supervisors, 16 Wall., 668.
Inhabitants vs. Railroad Co., 4 Mass., 564.
Brown vs. Duplessis, 14 La. Rep., 842-44.
Harrison vs. New Orleans Pacific Ry. Co., 34 An., 462.

In 135 N. Y., 253, it was held :

"To minister to the necessities of commerce by providing fit and proper places in its seaports where ships can be loaded and unloaded, with all proper facilities, is a public duty owing by the State, and through it by the municipality which governs and controls the Port; that, where a permanent pier and exclusive right to its use is a necessity of large steamship lines, without which its business cannot be properly transacted, the duty rests upon the State or the municipality to provide such accommodations, and where this duty has been imposed by the State upon the municipality, and it has undertaken its performance, all appropriate acts done by it in such performance are for a public purpose."

We submit that there could be no difference between a Park Commission, in respect to batture outside of the levee, under water at high water, and any other riparian owner. The Park Commission got by deed the riparian right from its grantor and no more. There is no law changing this riparian right, because it had been conveyed to Park Commissioners. The Park Commission being abolished, its duties as such were imposed on the city, but there was nothing taking away or denying the right of the city in its capacity as a municipality to administer the use of the batture. It would be very strange and exceptional in a commercial city which extends a long distance on the river above the park if the right of the city to use the river bank and batture outside of the levee in its capacity as a city should be taken away, because it was also charged with another duty of taking care of a park inside of Tchoupitoulas street. The park measures 2259 feet on this public road or Tchoupitoulas street and extends back to St. Charles avenue with diminished width. Its front is nearly half a mile in width.

If the city as a city is without power to administer the use of this batture outside of the public levee, she is in a very unhappy condition as an emporium of commerce. Such a right could only be denied under plain rules and plain principles, and we know of no legal reason why it should be denied.

Attention may be again directed to the fact that the ownership of the riparian proprietor at this point, whatever may be the name of such proprietor, is what is called in our Code, Art. 490, "imperfect ownership," being burdened with the servitude and right of administration, above described, for public purposes.

It should also be specially noted that the learned Court below, in recognizing our right to the use of this batture for the plainly public purposes recited in the lease, did say, "*without prejudice*, however, *to any rights* which the City of New Orleans as the successor of the late Park Commission which as having the administration of the Audubon Park vested in it by law, may have in limitation or control of the rights and grants of which is hereby confirmed springing out of the destination of the said Audubon Park as a public place." We fail to see what complaint the City of New Orleans can make in the presence of such a reservation.

It may be added that the lease of the batture in front of the park is not an alienation by the city, but simply amounts to an act of administration.

It is elementary in Louisiana that a lease is not a conveyance in the sense of alienation, and does not confer upon the lessee either the legal possession or any proprietary interest in the immovable.

In the case of Hoffman vs. Lorens, 18th Louisiana, page 73, the Court drew the distinction between the

jus in re of the usufructuary, and the personal right of a lessee. It declared that the right of the lessee is strictly personal, giving to the lessee only the use of the property, but conferring neither the legal possession nor any proprietary interest in it.

By Act No. 48 of 1871, Sec. 7, a limit of ten years was placed upon the power of the city to lease "wharves and landings," but this batture in front of the city park was neither a wharf nor a landing in any sense in which those terms are employed in the Act of 1871.

The phrase "wharves and landings" means legally what the city can properly sell the revenues of, as held in Lannon vs. New Orleans, 20 Wallace, 577, 582, and Ouachita vs. Aiken, 121 U. S., 444, 446. The Act of 1871 is quoted in the latter case.

This is common knowledge in New Orleans, and may be illustrated by reference to Flynn's "Digest" published in 1896, by the authority of the City Council.

In that Digest, page 1214, we find the last ordinance upon the subject providing for the wharf lease which began in 1891, and at page 1217, we find a description of the wharves and landings, the revenues of which were sold under this ordinance. They begin at Toledano street, about two miles below the park, and extend thence down to Piety street, in the Third District. When we come to ask what the "landings" are, we find by reference to Article 3303, beginning at the foot of page 1217, that they are a strip of land behind the wharves and between those wharves and a designated parallel line. Below what is known as the Coal Landings this strip is declared to extend from the wharves to the outer line of the Texas and Pacific Railroad track.

These landings are an adjunct and heavy freight is thus kept on terra firma.

The city has never undertaken to sell the revenues of any landing in front of the Upper City Park. There was no landing there in the sense in which she was authorized to make a lease of the wharves and landings by selling their revenues to the highest bidder.

It may again be noted that the City has received and kept $1,000 of our money devoted by Section 2 of the Ordinance No. 6938 to the improvement of the park, and undertakes to repudiate the lease without returning this money. This action is similar to that denounced in the case of New Orleans vs. Steamship Company, 20th Wallace, p. 395.

THIRD POINT.

We submit that the foregoing considerations dispose of this case in our favor; but, if it be necessary to go into the question of the performance of the resolutory conditions imposed upon the railway by the ordinances in question, we submit with great confidence that the railway company has complied with those conditions, and that from this point of view the decree of the lower Court ought to be affirmed.

It will be noticed by an inspection of the ordinances that in the first, No. 6695, A. S., the right of the rail-

way company, given by the Legislature in Act No. 14 of 1876, to establish and maintain in the City of New Orleans proper freight and passenger depots, and to construct wharves, piers, warehouses, yards, depots and stations, and to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across and *along or upon any street, highway*, turnpike or canal in the State of Louisiana which the course of said railroads may intersect, touch or cross (Transcript, pp. 46–54), is distinctly recognized; and the statement is made that it is for the interest of the City of New Orleans that the southern *terminus* of said railway shall be fixed and established within the city limits, and, after various recitals of the desires and then-existing plan of the railway company in regard to the line of the road, the preamble concludes as follows:

"Now, therefore, for the purpose of permanently securing to the City of New Orleans the advantages which will result from locating and maintaining the terminus of the said New Orleans and Pacific *within the city limits.*"

The exact location of the terminus was left to the desire and option of the railway company.

Proceeding now to Section 4 we find that the right of way, franchises and privileges herein granted to the New Orleans and Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road *within the city limits*, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and, should the said company at any time hereafter abandon its said road on the east side of the Mississippi River *and* its terminus within the

city limits, then this grant shall cease and terminate and be without further force and effect from the date of such abandonment. Then, after certain provisions as to method of construction, a further condition was added that said railway company should complete its road from the crossing of the Mississippi River at or near Baton Rouge to its terminus in this city within two years from the promulgation of this ordinance. This time limit would expire in November, 1882.

It should further be noticed in this ordinance, No. 6695, that by Section 5 the rights on Claiborne street apply only to a railroad for passenger purposes, it being plain that the point of this grant in Claiborne street was to get to a passenger station which might be established on Claiborne street near Canal, where there is a neutral ground of great width occupied by the Claiborne market.

The interest of the City of New Orleans, then, in the matter was that the southern terminus of said railroad should be fixed and established *within the city limits*, and the purpose of the ordinance, in so many words, was to permanently secure to the City of New Orleans the advantages that would result from locating and maintaining the terminus of the railway within the city limits. Just where that terminus was to be was left to the desire and option of the company.

The second ordinance, No. 6732, A. S., is not specially in question in this cause as to conditions, because neither of the repealing ordinances of which we complain undertakes to rescind the right on Thalia street itself. The ordinance No. 685 refers only to a lease of the batture in front of the Upper City Park, and the ordinance No. 1828, C. S., undertakes to rescind only rights on Claiborne street. But it may be

observed that No. 6732 makes an important construction of ordinance No. 6695, to which it is supplemental. It refers again to the terminus simply as being within the *city limits* (p. 56), and grants the rights mentioned on condition and in consideration that that said grantor shall permanently establish the terminus of said road *within the city limits*, and maintain the said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last. And should the company at any time abandon its said road on the east side of the Mississippi River *and* its terminus within the city limits, then the grant was to cease and terminate. Certain paving was to be done only when the track should be laid, and the laying of this track was not to be done in any particular time ; and it was further provided that the railroad company should complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to the terminus in this city within two years from the promulgation of this ordinance, which would be in December, 1882.

Coming now to the third ordinance No. 6938, A. S., we find a change of plan corresponding to the historical and topographical facts in the case.

There was no longer any present interest in a railway coming in from the west, crossing at or near Baton Rouge, and coming down thence on the east side of the river. The railway company had under its charter full power to build on either or both sides of the river (p. 54). The fact is recognized and the preamble recognizes the fact that it had acquired the railroad theretofore constructed on the west bank of the Mississippi River, between Bayou Goula and Westwego ; in other words, nearly all the way from New Orleans to

It should be noted, that up to the time of the adoption the ordinance of March 29th, 1881, No. 6938, we could only use Claiborne street for *passenger* trains, and Thalia street leading thence to the river for *freight* trains. Transcript, p. 56. But, in the change of plan, necessitated by the fact that the railroad came down the west bank of the Mississippi River, crossing into New Orleans at Thalia street, a change conceded to have been agreed to by the City (see appellant's brief, p. 30), in the last granting ordinance of March 29th, 1881 (Transcript, p. 59, Sec. 4), the terminal facilities to be established between Thalia and Terpsichore streets, on the river front, were plainly allowed to be used for *both* purposes; passengers, freight or any other matters proper in the transaction of the business of the Company. It is obvious from this that the intention of all parties was, that our terminus, in its most useful and inclusive sense and form, was to be established there. And it was established and connected with a crossing of the Mississippi River within the two years, and the fact fully recognized in the next Ordinance, No. 7946, Transcript, p. 61. And there it has been operated and maintained ever since.

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Baton Rouge. It was recognized that this was to be operated as a part of the through line to and from a terminus in New Orleans, and the *option* was still recognized in the railway company to designate a terminus between the new canal, Claiborne Canal and Carrollton avenue.

These recitals exhibit a change of plan and a recognition of that change.

The second section of the ordinance makes the lease of the batture in front of the Upper City Park in such a way that that place might have been selected and designated by the company as a terminus, having stations, depots, tracks, &c.

The fourth section does the same in regard to the property of the company itself, between Thalia street and Terpsichore street on the Mississippi River. The company is authorized, at its own expense, to erect and maintain there such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, *stations*, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers, and freight, and in the transaction of its business; in other words, terminals.

The company was to build 300 feet of new wharf at some other point above, between Terpsichore and Jackson streets, for the city, and this was done as part of the plan under the direction of the City Surveyor and to the satisfaction of the administrators, at an expense of $5,000.

After this change of plan it was undisputed that the terminal facilities of the road might be designated and established by the company on the river, between Thalia and Terpsichore streets, a place plainly more advantageous for commerce than would be a terminus in

the low and distant lands behind Claiborne street in the rear of the city.

By the sixth section the conditions of all the ordinances were rearranged, and the statement is distinctly made, not only as to the rights granted by this ordinance No. 6938, but as to those theretofore granted. It is declared that the

"right of way, franchises and privileges herein and *heretofore* granted to the New Orleans Pacific Railway Company are and *were* granted on condition and in consideration that the said grantee shall permanently establish *its terminus* within the city limits, and shall maintain such terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company at any time hereafter remove *its terminus* from within the city limits, then this grant shall cease and determine and be without force and effect from the date of such removal."

And after provisions with respect to construction work, in regard to which there is no question, the further condition is established that said railway company shall construct or control a line of road ready for use, from *a crossing* of the Mississippi River to its designated terminus in New Orleans, within two years from the promulgation of this ordinance, which would be in March, 1883.

It is apparent then, that the question of a railroad on the east bank of the Mississippi River from a point at or near Baton Rouge disappeared from view. It was for the interest of the public that there should not be unnecessary construction, and it is a matter of public history that another road was being built on the east side of the Mississippi River from Vicksburg and Baton Rouge, where it now exists. The conditions,

If we are to go outside of the language of the 4th Section of Ordinance 6695, and the modification in the 6th Section of Ordinance No. 6938, to hunt for technicalities, we may note that in Section 1 of latter ordinance, Transcript, top of p. 50, we are left to designate a terminus "east of Carrollton Avenue."

Now, Carrollton Avenue is very long and runs about *north* from the river to the Bayou St. John. On the right hand as you go out is the east, and that leaves the Company the choice of any suitable place between Carrollton Avenue, Canal street and the River, and the terminus mentioned in Ordinance 7946 is in this territory.

therefore, of all the rights are summed up in Section 6, page 60, of the transcript. The grantee is to permanently establish its terminus within the city limits, and maintain it, and is to construct or control a line of road ready for public use from a crossing of the Mississippi River to its designated terminus in New Orleans, within two years. At what point the river should be crossed also disappeared from consideration or condition. Still the point was to have a terminus in New Orleans connected with a road to Shreveport, and those conditions have been entirely fulfilled.

The work was done more rapidly than was required, and it is a matter of public history that the New Orleans Pacific Railway and its successor The Texas and Pacific Railway, running from that Thalia street terminus, in the City of New Orleans, on the east side of the Mississippi River, by transfer boats for passenger cars and freight cars, has brought an enormous commerce to the City of New Orleans. It has placed and kept New Orleans not only foremost in the cotton export of the world, but nearly foremost in the exporting grain from the West and from the Northwest.

The undisputed testimony of Mr. Wheelock shows fully that the terminus at Thalia street was established as early as March, 1882, on the property owned by the company between Thalia street and Terpsichore street (p. 25 *et seq.*), connected by transfer boat with the west side of the river at Gouldsboro', and from there to Baton Rouge Junction and Baton Rouge to Shreveport, which by the charter was the western terminus.

The further testimony of Wheelock and Strong (pp. 64 and 65) is undisputed in regard to the establishment of this designated terminus, its permanent character, its value assessed at $612,000, the construction of a large

number of tracks there on the east side of the Mississippi River at Thalia street, their connection to a crossing of the Mississippi River at Thalia street, the method by which passenger trains and freight trains are crossed by transfer boats to Gouldsboro' on the west bank, and removed thence to Baton Rouge Junction and Baton Rouge, where freight and passengers are crossed on another ferry, and from Baton Rouge Junction on to Shreveport and El Paso. All this was done prior to July, 1882, and the road has been operated so constructed and completed in 1881 and prior to July, 1882, has been operated ever since. It was out of repair somewhat at the moment of the receivership, but was repaired and restored to the company when the receivership terminated in 1888. The Texas and Pacific Railway Company went into actual possession about September, 1882. The testimony is full on this point, and there will be no contradiction, we imagine, in regard to these facts.

Mr. Harrod, as City Surveyor, testifying (p. 76) on behalf of the city, speaks of the works at Thalia street as the terminals or terminal facilities, and Mr. Brosnan, City Surveyor, informs us that he gave all the lines required under the ordinances, except between Louisiana avenue and Jackson streets on the river front, to which matter we will allude hereafter. That was the only disputed point (pp. 83, 84). And the city offered the map " P " showing this designated terminus (pp. 23-72). But this is by no means all. The administrators themselves acted unanimously in the matter, and on July 11th, 1882, and long within the time-limit required, adopted the ordinance No. 7946, A. S., which is declared to be supplemental to ordinance Nos. 6695, 6732 and 6938, in which they declare

that the New Orleans Pacific Railway Company had completed its road from Baton Rouge to New Orleans crossing at Thalia street, and established its terminus in the city limits at Thalia street and the levee, thus showing their entire satisfaction with the matter.

It would be impossible to have a plainer declaration and recognition upon this subject. It showed a railroad completed from Baton Rouge to New Orleans, crossing at Thalia street, and it shows the establishment of the terminus of the road in the city limits at Thalia street and the levee ; and it seems to us the height of injustice and the baldness of technicality to assume that the City of New Orleans by this action was leading a railroad company into a pitfall and would try to rise up four years after and assert that we have not exercised our right to establish a terminus in the proper place. It is elementary that conditions subsequent are not to be interpreted in any narrow or technical spirit. Conditions subsequent are not favored in law, because they tend to destroy estates. They are, therefore, easily subject to be modified or waived.

In Ludlow vs. New York and Harlem Railroad Company, 12th Barbour, 440, land was conveyed to the railway and the deed was to cease and be void unless the railroad was completed through the premises granted, on or before a certain day, and it was not so completed. The Court cited a number of cases to the effect that forfeiture for a breach of a condition subsequent is not favored in law ; and where the forfeiture is once waived the Court will not assist it. And the Court held that the plaintiff had by mere conduct waived the forfeiture, although the case was not nearly as strong against him as this case is against the City of New Orleans.

In Foster vs. Fitch, 36th Conn., 236, there was a condition subsequent that the railroad should be completed in a certain time, and it was not so completed. But this condition was held to have been waived by an act of the Legislature authorizing the railroad company to issue certain bonds.

In the case of the Sharon Iron Company vs. The City of Erie, 41st Penn. State Reports, 341, the conditions in a certain grant by the city corporation were held to be conditions subsequent, and to have been waived by the substitution of the right to make a blast furnace instead of the bloomery, although the blast furnace was never built.

As for the provision that "construction work within the city limits" should be done under the direction of the City Surveyor and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce, there was no issue or dispute in the lower court concerning the work which has actually been done.

This work was all done on the terminal property of the railroad company on the river Mississippi between Thalia and Terpsichore streets. This property, some 800 feet front, had been acquired at great expense, and the terminals thus constructed on it cost at least $612,000, including the price of the land, which was about $175,000. This terminus was established under Section 4 of the Ordinance No. 6,938, A. S., upon our own property, and it might well be that no special direction of city officials would be required for a work of this kind; the construction work within the city limits being that in the streets in which the city was interested in the way of administration. But it was conceded that, so far as such direction of the City Surveyor was

required, it was had. The map marked T and P, concerning which Mr. Wheelock and Mr. Brosnan testified, exhibits lines given by Mr. Brosnan in Thalia street to the river and on Pilie street, which is the river front between Thalia and Terpsichore streets.

The testimony of Mr. Wheelock (p. 31) shows that the new wharf, 300 feet long, between Terpsichore and Jackson streets, to be built for the city as the consideration of the grant in Section 4 of the Ordinance No. 6938, A. S., and as part of that work, was built at an expense of $5,000, to the satisfaction and approval of the City Administrators and the City Surveyor, and was paid for upon the approval of Brosnan, Surveyor.

Mr. Brosnan's testimony shows that Mr. Wheelock, as president of the New Orleans Pacific, and Mr. Brosnan, as City Surveyor, were in constant conference over the matter of the work as far as it was done, and Mr. Brosnan testifies (p. 84) that he furnished the railway company all the lines and levels called for by the ordinances, except the disputed portion between Louisiana avenue and Jackson street, along the river front, which dispute was one of the principal causes of the trouble in this case. Mr. Brosnan declares (p. 84) that this was the *only disputed point.*

No question has ever been made of the completion of the work to the satisfaction of the Administrator of Improvements and the Administrator of Commerce so far as such work was done. That provision applied in reality to the completion of all the work contemplated by the ordinances, and that completion has been prevented by the city herself. When an obligee prevents the performance of a condition, it is considered as fulfilled (Rev. C. C., Art. 2040 [2038]). But so far as the work has been done, not only is the satisfaction

of these special administrators shown by the testimony of Wheelock, but the ordinance, No. 7946, is conclusive upon the question of the terminus being established on our riparian property at Thalia street and the river before July 11th, 1882. And in her paving suit, as late as 1888, which suit is still pending, the city claims that we have availed ourselves of our rights at the Thalia street terminus.

Under the City Charter of 1870 (Acts of 1870, p. 31), the City Council was composed of the Mayor and seven administrators, including the Administrator of Improvements and the Administrator of Commerce. This council, so composed, and including the officers whose satisfaction was to be indicated in some way, adopted without dissent this ordinance No. 7946, A. S., of July 11th, 1882, and beyond doubt expressed not only the satisfaction of these two administrators, but of all of them, with the method in which that terminus and transfer crossing at Thalia street had been established, and the two connected and extended to Baton Rouge.

The City Charter of 1870, under which these grants were made, and which was known as the Administration Charter, was repealed in June, 1882, the repeal to take effect in November, 1882 (Acts of 1882, pp. 14–37). In the summer and fall of 1882, as shown by the testimony of Wheelock and Brosnan, a controversy arose as to lines to be given by the city Surveyor for the continuance of the work under the ordinances. The City Surveyor refused to give lines on the river front from Louisiana avenue to Jackson street, under section 3 of ordinance No. 7938.

It seems plain that the railway company had a right under that section to extend its tracks from the batture

in front of the park along the river front; firstly, to connect with the Belt Railroad existing in Louisiana avenue, and then to connect at Jackson street with its tracks authorized by the two previous ordinances. The tracks so to be extended along the river front between Louisiana avenue and Jackson streets were *its* tracks—the tracks of the railway company—and there was a proviso that between Louisiana avenue and Jackson streets the trains of *said company* should only run between sunrise and sunset *on said track*.

The New Orleans Pacific thereupon commenced a suit of mandamus to obtain these lines, which the city defended, and that suit is still pending (p. 85). While this suit was pending the Council which had come into power under the new charter of 1882, passed the repealing ordinance No. 685, Council Series, repealing the batture lease, thus further undertaking to dismember our proposed system of tracks. And, in the meantime, the city neglected and refused to carry out the directions of the ordinance No. 7946, A. S., so that we might remove the Claiborne street market and lay the passenger track contemplated in Claiborne street and build a passenger station there. And this refusal still continues (p. 39). Our system of ordinances was thus torn to pieces by the hostile action of a new Council.

We have demonstrated above that the railway company fulfilled the conditions of these agreements so far as they were required to be fulfilled within any special time. It may be added that the language we have quoted from the 6th section of the ordinance No. 6938, A. S., and the ordinance No. 7946, would be in case of doubt the foundation for a decision in our favor.

We do not concede that any doubt should exist, but if there be any it is elementary in Louisiana that the

method *in which an agreement has been executed by both parties or by one with the expressed or implied assent of the other*, furnishes the rule for the interpretation of the agreement, and this is the textual provision of our Revised Civil Code, Art. 1956. This is not only good law, but common sense and equity.

Now, in this case the railway company proceeded to do all that was required to be done within the time limit of the ordinances, and its action received not only the implied but the expressed assent of the other party. And it would be very unjust to let the City of New Orleans now repudiate the ordinance No. 7946.

On this point we may refer to U. S. vs. Alabama, &c., R. R., 142 U. S., 615, 621, and the remarks of the Court through Mr. Justice BROWN and the cases there cited. The principle there laid down is quite in accord with the rule above cited from the Code of Louisiana.

The City of New Orleans by her refusals and by her acts has prevented us from doing more than we have done.

The maxim that equity imputes an intention to fulfill an obligation may be applied to the fulfillment in this case by the railway company, and the recognition of that fulfilment by the Ordinance No. 7946, A. S. As stated by Mr. Pomeroy, in his work on Equity Jurisprudence, Sect. 420, Vol. 1, the maxim means that, wherever a duty rests upon the individual, in the absence of all evidence to the contrary it shall be presumed that he intended to do right rather than wrong; to act conscientiously rather than with bad faith; to perform his duty rather than to violate it.

It would seem that such a maxim could be well applied where the railway company, as in this case, has

designated and established a terminus within the city limits and connected it with a crossing of the Mississippi River, so as to make railway connection with Baton Rouge and with Shreveport, and attained the object which the city had in view, and especially where the city herself, by the Ordinance No. 7946, has recognized such performance of a condition subsequent.

FOURTH POINT.

The record shows that all the rights sought to be taken away by the repealing ordinances in this case, were mortgaged to the complainant the Fidelity Insurance Trust and Safe Deposit Company to secure issues of bonds exceeding five millions of dollars. One of these mortgages was made July 31, 1880, and the other August 1st, 1884 (Transcript, pp. 8 and 63).

At the request of the city, in order to save expenses of the transcript it was stipulated at page 63 that these mortgages cover the rights given by the ordinances set forth in the bill of complaint, as therein stated, to secure issues exceeding five millions of dollars. We find, therefore, that this co-complainant the Fidelity Insurance, Trust and Safe Deposit Company has an interest as co-complainant and represents over five million dollars of bonds, and that the rights sought to be taken away by the repealing ordinances constitute a part of the security of these bonds and this mortgage. The mortgagee and bondholders thus acquired rights

that should not be disregarded and cannot be taken away except according to law. And on this subject we may again refer to the case of the Sharon Iron Company vs. the City of Erie, 41st Penn., 341.

FIFTH POINT.

The transcript shows action in the cause by both the Circuit and District Judges (pp. 20, 85). **They were both well acquainted with the history and geography involved in the controversy and the questions were carefully considered. A large presumption exists in favor of the correctness of their views.**

We can see no reason why the existing decree should be either reversed or disturbed but, if such reason does exist, the case should be remanded or otherwise disposed of without prejudice.

The decree below should be affirmed.

Respectfully submitted,

W. W. Howe,

John F. Dillon,

Of Counsel for Appellees.